

1 IGNACIA S. MORENO  
Assistant Attorney General  
2 Environment and Natural Resources Division  
3 EILEEN T. MCDONOUGH  
Trial Attorney  
4 United States Department of Justice  
Environmental Defense Section  
5 P.O. Box 7611  
6 Washington, DC 20044  
Telephone: (202) 514-3126  
7 Fax: (202) 514-8865  
Email: eileen.mcdonough@usdoj.gov  
8 *Attorneys for Defendants*  
9  
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11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION  
14

15 WILDEARTH GUARDIANS,  
16 Plaintiff,

17 v.

18 LISA JACKSON, in her official capacity  
19 as Administrator of the Environmental  
20 Protection Agency,  
21 Defendant.  
22  
23  
24  
25  
26  
27  
28

Case No. 3:11-CV-05651-YGR

DEFENDANT'S MEMORANDUM  
IN SUPPORT OF MOTION TO  
DISMISS FIRST CLAIM

NOTICED FOR HEARING  
MARCH 13, 2012 AT 2:00 PM

# TABLE OF CONTENTS

|    |  |    |
|----|--|----|
| 1  |  |    |
| 2  | INTRODUCTION.....  | 1  |
| 3  | STATEMENT OF ISSUE.....  | 2  |
| 4  | BACKGROUND.....  | 2  |
| 5  | I. STATUTORY AND REGULATORY BACKGROUND.....                    | 2  |
| 6  |  |    |
| 7  | A. Citizen Suit Provision.....                                 | 2  |
| 8  | B. The Ozone NAAQS.....  | 3  |
| 9  | C. Implementation Plans.....                                   | 4  |
| 10 | D. Prevention of Significant Deterioration of Air Quality..... | 5  |
| 11 |  |    |
| 12 | STANDARD OF REVIEW.....  | 7  |
| 13 | ARGUMENT.....  | 7  |
| 14 | I. THE COURT LACKS JURISDICTION OVER GUARDIANS’                |    |
| 15 | FIRST CLAIM BECAUSE GUARDIANS IS MISTAKEN                      |    |
| 16 | IN ALLEGING THAT CAA SECTION 166(a) IMPOSES A                  |    |
| 17 | NONDISCRETIONARY DUTY WITH RESPECT TO THE                      |    |
| 18 | 2008 OZONE NAAQS REVISION WITHIN THE SCOPE OF                  |    |
| 19 | JURISDICTION UNDER THE CITIZEN SUIT PROVISION.....             | 7  |
| 20 |  |    |
| 21 | CONCLUSION.....  | 10 |
| 22 |  |    |
| 23 |  |    |
| 24 |  |    |
| 25 |  |    |
| 26 |  |    |
| 27 |  |    |
| 28 |  |    |

**TABLE OF AUTHORITIES****FEDERAL CASES**

|   |   |
|---|---|
| <u>American Petroleum Inst.v. Costle,</u>             |   |
| 665 F.2d 1176 (D.C. Cir. 1981) .....                  | 4 |
| <u>BFP v. Resolution Trust Corp.,</u>                 |   |
| 511 U.S. 531 (1994) .....                             | 9 |
| <u>Kennecott Copper Corp. v. Costle,</u>              |   |
| 572 F.2d 1349 (9th Cir. 1978) .....                   | 3 |
| <u>Kokkonen v. Guardian Life Ins. Co.,</u>            |   |
| 511 U.S. 375 (1994) .....                             | 7 |
| <u>Marley v. United States,</u>                       |   |
| 567 F.3d 1030 (9th Cir. 2009) .....                   | 9 |
| <u>Owen Equip. &amp; Erection Co. v. Kroger,</u>      |   |
| 437 U.S. 365 (1978) .....                             | 7 |
| <u>Paul Revere Ins. Group v. United States,</u>       |   |
| 500 F.3d 957 (9th Cir. 2007) .....                    | 9 |
| <u>Russello v. United States,</u>                     |   |
| 464 U.S. 16 (1983) .....                              | 9 |
| <u>Sierra Club v. Thomas,</u>                         |   |
| 828 F.2d 783 (D.C. Cir. 1987) .....                   | 2 |
| <u>Tosco Corp. v. Communities for a Better Env't,</u> |   |
| 236 F.3d 495 (9th Cir. 2001) .....                    | 7 |

**STATUTES**

|                              |   |
|------------------------------|---|
| 42 U.S.C. § 7406(a) .....    | 8 |
| 42 U.S.C. § 7408 .....       | 3 |
| 42 U.S.C. § 7408(a)(1) ..... | 3 |

Motion to Dismiss First Claim

Case No. 11-cv-05651-YGR

|    |   |          |
|----|---|----------|
| 1  | 42 U.S.C. § 7408(a)(2).....             | 3        |
| 2  | 42 U.S.C. § 7409.....                   | 3        |
| 3  | 42 U.S.C. § 7409(a)-(b) .....           | 3        |
| 4  | 42 U.S.C. § 7409(d)(1) .....            | 3,8      |
| 5  | 42 U.S.C. § 7410(a) .....               | 2        |
| 6  | 42 U.S.C. § 7410(a)(1).....             | 4,8      |
| 7  | 42 U.S.C. § 7410(a)(2).....             | 4        |
| 8  | 42 U.S.C. § 7410(k)(1)(B) .....         | 2        |
| 9  | 42 U.S.C. §§ 7470-7479 .....            | 5, 6     |
| 10 | 42 U.S.C. § 7471.....                   | 5        |
| 11 | 42 U.S.C. § 7475.....                   | 5        |
| 12 | 42 U.S.C. § 7476.....                   | 5        |
| 13 | 42 U.S.C. § 7476(a) .....               | 2, 6     |
| 14 | 42 U.S.C. § 7604(a)(2).....             | 1, 2     |
| 15 |   |          |
| 16 |   |          |
| 17 | <b>FEDERAL RULES OF CIVIL PROCEDURE</b> |          |
| 18 | Fed. R. Civ. P. 12(b)(1).....           | 2, 7, 10 |
| 19 |   |          |
| 20 | <b>CODE OF FEDERAL REGULATIONS</b>      |          |
| 21 | 40 C.F.R. § 50.15.....                  | 4        |
| 22 | 40 C.F.R. § 51.166.....                 | 6, 7     |
| 23 | 40 C.F.R. § 51.166(b)(23)(i).....       | 7        |
| 24 | 40 C.F.R. § 51.166(b)(49)(1).....       | 7        |
| 25 |   |          |

Motion to Dismiss First Claim

Case No. 11-cv-05651-YGR

|   |                                  |      |
|---|----------------------------------|------|
| 1 | 40 C.F.R. § 51.166(j) .....      | 7    |
| 2 | 40 C.F.R. § 51.166(k)(i).....    | 7    |
| 3 | 40 C.F.R. § 52.21(a)(1).....     | 6, 7 |
| 4 | 40 C.F.R. § 52.21(b)(23)(i)..... | 7    |
| 5 | 40 C.F.R. § 52.21(b)(50)(1)..... | 7    |
| 6 | 40 C.F.R. § 52.21(j) .....       | 7    |
| 7 |                                  |      |
| 8 | 40 C.F.R. § 52.21(k)(1)(i).....  | 7    |

**FEDERAL REGISTER**

|    |  |      |
|----|--|------|
| 10 | 36 Fed. Reg. 1502 (Jan. 30, 1971) .....  | 4    |
| 11 |  |      |
| 12 | 36 Fed. Reg. 8186 (April 30, 1971).....  | 4    |
| 13 | 43 Fed. Reg. 26,388 (June 19, 1978)..... | 7    |
| 14 | 44 Fed. Reg. 8202 (Feb. 8, 1979) .....   | 4    |
| 15 | 67 Fed. Reg. 80,186 (Dec. 31, 2002)..... | 6    |
| 16 | 73 Fed. Reg. 16,511 (Mar. 27, 2008)..... | 4,10 |

## INTRODUCTION

Plaintiff WildEarth Guardians (“Guardians”) filed this action pursuant to section 304(a)(2) of the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. § 7604(a)(2), which provides the federal district courts with jurisdiction to hear actions alleging that EPA has failed to perform a nondiscretionary duty required by the Act. Plaintiff’s first claim alleges that EPA failed to perform a nondiscretionary duty under CAA section 166(a) to promulgate regulations to prevent the significant deterioration (“PSD”) of air quality for the pollutant ozone within two years of March 12, 2008, when the Agency promulgated revisions to the national ambient air quality standards (“NAAQS”) for ozone (“2008 Revised Ozone NAAQS”). Complaint (“Compl.”) ¶¶ 31-36 (citing 42 U.S.C. § 7476(a)).

Guardians, however, has misinterpreted the plain language of section 166(a). The part of section 166(a) Guardians relies upon requires EPA to take action based on the promulgation of a NAAQS for a pollutant. This provision does not impose a mandatory duty triggered by EPA’s revision of an existing NAAQS. There are a number of CAA provisions where Congress has established nondiscretionary duties triggered by either the promulgation or revision of a NAAQS. For example, Congress explicitly imposed a mandatory duty for EPA to review the NAAQS every five years and to revise the NAAQS themselves, if appropriate. CAA section 110(a), 42 U.S.C. § 7410(a). *See also* CAA provisions cited *infra* at 8 (requiring action after both promulgation and revision of NAAQS). Because Congress omitted any similar reference to revisions to a NAAQS in drafting section 166(a), that section cannot be construed as establishing a mandatory duty triggered

1 by a revision to an existing NAAQS.<sup>1</sup>

2 Because Guardians cannot show that the duty alleged in its first claim is nondiscretionary  
3 under the CAA, the first claim is outside the scope of the jurisdiction provided to this Court by the  
4 citizen suit provision. Accordingly, pursuant to Fed. R. Civ. P. 12(b)(1), Guardians' first claim  
5 should be dismissed for lack of subject matter jurisdiction.  
6

## 7 **STATEMENT OF ISSUE**

8 Whether Guardians can establish that CAA section 166(a) imposes a nondiscretionary duty  
9 on EPA to promulgate PSD rules within two years after a revision to a NAAQS for a pollutant for  
10 which a NAAQS was promulgated earlier even though the plain language of section 166(a) only  
11 requires such action for pollutants for which NAAQS are promulgated after August 7, 1977, and,  
12 unlike other CAA provisions, does not require specific action when an existing NAAQS is revised.  
13

## 14 **BACKGROUND**

### 15 **I. STATUTORY AND REGULATORY BACKGROUND**

#### 16 **A. Citizen Suit Provision**

17 In CAA section 304(a)(2), Congress provided that any person can sue the Administrator of  
18 EPA "where there is alleged a failure of the Administrator to perform any act or duty under this  
19 chapter which is not discretionary." 42 U.S.C. § 7604(a)(2). The D.C. Circuit has explained that,  
20 under this provision, "the district court has jurisdiction over claims alleging that the agency has  
21 violated a nondiscretionary duty of timeliness." *Sierra Club v. Thomas*, 828 F.2d 783, 790 (D.C.  
22

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23  
24 <sup>1/</sup> EPA does not contest the Court's jurisdiction over the second claim, which alleges that EPA  
25 failed to make a timely finding under by CAA section 110(k)(1)(B), 42 U.S.C. § 7410(k)(1)(B), that  
26 many states had failed to submit the state implementation plans required by section 110(a)(1) after  
the 2008 Revised Ozone NAAQS were promulgated.

1 Cir. 1987). The Ninth Circuit has emphasized that the scope of jurisdiction provided by this section  
 2 must be read narrowly. *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1353 (9<sup>th</sup> Cir. 1978)  
 3 (“Thus, the non-discretionary duty requirement imposed by § 304 must be read in light of the  
 4 Congressional intent to use this phrase to limit the number of citizen suits which could be brought  
 5 against the Administrator and to lessen the disruption of the Act’s complex administrative process.”).  
 6

### 7 8 **B. The Ozone NAAQS**

9 Two sections of the Act govern the establishment and revision of the NAAQS. Section 108  
 10 of the CAA, 42 U.S.C. § 7408, directs the Administrator to identify and list certain air pollutants and  
 11 then to issue air quality criteria for those pollutants. The Administrator is to list those air pollutants  
 12 that in her “judgment, cause or contribute to air pollution which may reasonably be anticipated to  
 13 endanger public health or welfare;” “the presence of which in the ambient air results from numerous  
 14 or diverse or mobile or stationary sources;” and “for which . . . [the Administrator] plans to issue air  
 15 quality criteria.” 42 U.S.C. § 7408(a)(1). The statute provides that EPA was to publish a list of  
 16 such pollutants by January 31, 1971, and to revise the list “from time to time.” *Id.* Within one year  
 17 after a pollutant is added to the list, EPA must publish air quality criteria for that pollutant, *id.* §  
 18 7408(a)(2).  
 19  
 20

21 Section 109, 42 U.S.C. § 7409, then directs the Administrator to propose and promulgate  
 22 NAAQS for each pollutant for which air quality criteria are issued at levels sufficient to protect the  
 23 public health and welfare. Congress also set a deadline of January 31, 1971 for issuance of NAAQS  
 24 for those pollutants for which air quality criteria had previously been issued. CAA section 109(a)-  
 25 (b), 42 U.S.C. § 7409(a)-(b). Section 109(d) further provides that every five years EPA must review  
 26



the air quality criteria and NAAQS for each pollutant and revise the criteria and NAAQS and promulgate new NAAQS “as may be appropriate” in accordance with sections 108 and 109(b).

Air quality criteria had been issued for photochemical oxidants prior to December 31, 1971, and in 1971 EPA issued NAAQS to address this pollutant. 36 Fed. Reg. 1502 (Jan. 30, 1971), 36 Fed. Reg. 8186 (April 30, 1971). EPA used “photochemical oxidants” as the chemical species indicator for the 1971 NAAQS. EPA revised these NAAQS in 1979 and, as part of the revision, modified the indicator for the standard to focus on “ozone” because it was the photochemical oxidant measured to implement the original standard. Ozone is the largest class of photochemical oxidants found in the ambient air. It is not usually emitted directly by sources, but instead is primarily formed in the air by “chemical reactions between oxidant precursors (nitrogen oxides and organic compounds) in the presence of sunlight.” 44 Fed. Reg. 8202, 8202 (Feb. 8, 1979).

EPA thus changed the title of the NAAQS to refer to “ozone” rather than “photochemical oxidants.” 44 Fed. Reg. at 8219-20. *See American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1186 (D.C. Cir. 1981). EPA has periodically reviewed and revised the ozone NAAQS. As a result of the most recent review, EPA issued revised ozone NAAQS in 2008. 73 Fed. Reg. 16,511 (Mar. 27, 2008) (codified at 40 C.F.R. § 50.15).

### C. Implementation Plans

The Act provides that each State must prepare an implementation plan, or “SIP,” that provides for the implementation, maintenance and enforcement of the NAAQS in each air quality control region within the State. *Id.* § 7410(a)(1) & (a)(2). If a State fails to submit a SIP required by the Act, EPA must promulgate a federal implementation plan (“FIP”). The States must submit SIPs

1 within no more than three years after promulgation or revision of a NAAQS. *Id.* § 7410(a)(1).

#### 2 **D. Prevention of Significant Deterioration of Air Quality**

3 CAA sections 160 to 169, 42 U.S.C. §§ 7470-7479, establishes requirements to prevent  
 4 significant deterioration of air quality in areas that have been designated as attainment or  
 5 unclassifiable for any NAAQS. This program, referred to as the "PSD program," is carried out as  
 6 part of the CAA's implementation planning process. *Id.* § 7471. Section 161 requires that each SIP  
 7 or FIP must include "emission limitations and such other measures as may be necessary, as  
 8 determined under regulations promulgated under this part, to prevent significant deterioration of air  
 9 quality in each region (or portion thereof) designated pursuant to section 7407 of this title as  
 10 attainment or unclassifiable." *Id.* § 7471. A major component of the PSD program is a pre-  
 11 construction permitting requirement for large sources. *Id.* § 7475. Congress also established  
 12 pollutant-specific PSD requirements for particulate matter and sulfur dioxide in section 163 of the  
 13 Act.  
 14  
 15

16 Section 166 of the Act requires EPA to promulgate pollutant-specific PSD rules for  
 17 additional named pollutants, including "photochemical oxidants," no later than two years after  
 18 August 7, 1977. Separately, it requires EPA to promulgate such rules for other pollutants for which  
 19 NAAQS are promulgated after August 7, 1977. 42 U.S.C. § 7476. Subsection 166(a) is captioned  
 20 "hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides." (As noted above,  
 21 EPA's regulations now use ozone as the chemical species indicator for the NAAQS that address the  
 22 pollutant "photochemical oxidants.") Section 166(a) provides:  
 23

24 In the case of the pollutants hydrocarbons, carbon monoxide, photochemical  
 25 oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later  
 26 than two years after August 7, 1977, promulgate regulations to prevent the significant

deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

42 U.S.C. § 7476(a). Subparts (b), (c), and (d) of section 166 address the effective date, the necessary contents, and the specific measures to fulfill certain statutory goals and purposes that are required for such regulations.

EPA has promulgated regulations to implement the PSD program, which operates predominantly through EPA-approved state programs. *See* 40 C.F.R. § 51.166. EPA also manages a federal PSD program, which it administers in the absence of an approved state program, and which some states administer on behalf of EPA under authority delegated by EPA. *See* 40 C.F.R. § 52.21(a)(1). Thus, EPA has adopted two sets of PSD regulations that are codified as part of the implementation planning regulations. In 40 C.F.R. § 51.166, EPA established the requirements for the PSD programs to be included in any SIP. *See id.* § 51.166(a)(1) (requiring state plans to contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality); *id.* § 52.21(a)(1) (provisions applicable to state implementation plans that have been disapproved and federal PSD program).

The PSD program has applied to ozone since the late 1970s and continues to do so. One indication of this is that the Best Available Control Technology (“BACT”) requirement in 40 C.F.R. §§ 51.166(j) and 52.21(j) applies to each regulated New Source Review pollutant, which includes ozone. *See* 43 Fed. Reg. 26,388, 26,397 (June 19, 1978) (explaining that BACT covers “all criteria pollutants subject to NAAQS review”); *see also* 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002) (listing “ozone (VOC)” as one of the pollutants subject to federal PSD review and permitting requirements).

As another indication, the PSD permitting rules contain provisions that specifically relate to ozone. *See e.g. id.* § 51.166(b)(23)(i) (setting significant emission rates for pollutants, including ozone); *id.* § 52.21(b)(23)(i) (same). In addition, EPA regulations require a showing that a source will not cause or contribute to a violation of any NAAQS. *Id.* § 51.166(k)(1)(i); § 52.21(k)(1)(i). As these provisions make clear, ozone is a pollutant that is addressed by existing PSD regulations. *See also, id.* § 51.166(b)(49)(1) (defining “regulated NSR pollutant” to include any for which a NAAQS has been promulgated); § 52.21(b)(50)(1).

### STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(1) authorizes a motion to dismiss based on lack of subject matter jurisdiction. Where Congress place limits on the jurisdiction of federal courts, such limits “[m]ust be neither disregarded nor evaded.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). The plaintiff has the burden to establish that subject matter jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Tosco Corp. v. Communities for a Better Env’t*, 236 F.3d 495, 499 (9<sup>th</sup> Cir. 2001).

### ARGUMENT

#### I. THE COURT LACKS JURISDICTION OVER GUARDIANS’ FIRST CLAIM BECAUSE GUARDIANS IS MISTAKEN IN ALLEGING THAT CAA SECTION 166(a) IMPOSES A NONDISCRETIONARY DUTY WITH RESPECT TO THE 2008 OZONE NAAQS REVISION WITHIN THE SCOPE OF JURISDICTION UNDER THE CITIZEN SUIT PROVISION

Guardians alleges that CAA section 166(a) requires EPA to promulgate PSD rules within two years after the “revision or establishment of a NAAQS after 1977.” Compl. ¶ 18. The statute, however, does not require the EPA to promulgate new PSD rules when it subsequently makes changes to existing NAAQS. Section 166(a) requires:

1 In the case of the pollutants hydrocarbons, carbon monoxide, photochemical  
 2 oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later  
 than two years after August 7, 1977, promulgate regulations to prevent the significant  
 deterioration of air quality which would result from the emissions of such pollutants.

3 In the case of pollutants for which national ambient air quality standards are  
 4 promulgated after August 7, 1977, he shall promulgate such regulations not more  
 than 2 years after the date of promulgation of such standards.

5  
 6 42 U.S.C. § 7406(a) (emphasis added). Congress did not require any action after a revision to an  
 7 existing NAAQS.

8 Where Congress intended to impose a mandatory duty under the CAA that would be  
 9 triggered by the *revision* of a NAAQS rather than its original promulgation, it has done so explicitly,  
 10 as illustrated by the following examples:  
 11

- 12 1. Section 109(d)(1) requires that, every five years, EPA must review the air quality  
 13 criteria published under CAA section 108 and the NAAQS promulgated under  
 14 section 109(a) “and shall make such *revisions* in such criteria and standards and  
 15 promulgate such new standards as may be appropriate.” (emphasis added).  
 16
- 17 2. Section 110(a)(1) requires that the States shall submit SIPs “within 3 years ( . . . ) of  
 18 the promulgation of a [NAAQS] (*or any revision thereof*).” (emphasis added).  
 19
- 20 3. Section 107(d)(1)(B)(i) requires that “[u]pon promulgation *or revision* of a  
 21 [NAAQS],” the Administrator shall promulgate certain submitted designations of  
 22 areas as being in nonattainment, attainment, or unclassifiable, “as expeditiously as  
 23 practicable, but in no case later than 2 years from the date of promulgation of the new  
 24 or *revised* [NAAQS].” (emphasis added).
- 25 4. Section 307(d)(1)(a) makes specific rulemaking requirements applicable to “the  
 26

promulgation *or revision* of any [NAAQS].” (emphasis added).

42 U.S.C. §§ 7409(d)(1), 7410(a)(1), 7407(d)(1)(B)(i), 7607(d)(1)(a).

Section 166(a) is distinguishable from these provisions because it does not require EPA to promulgate PSD regulations, or indeed to take any action, after the “revision” of a NAAQS. Indeed, section 166(a) does not mention revision of a NAAQS at all. Instead, it refers to the promulgation of PSD rules by August 7, 1977 for ozone and other original criteria pollutants or within two years of promulgation of a NAAQS for “pollutants for which national ambient air quality standards are promulgated after August 7, 1977.”

The omission of any reference to revising PSD rules or taking action after a NAAQS *revision* should be construed as showing that Congress did not intend to impose any such mandatory duty. *See Marley v. United States*, 567 F.3d 1030, 1037 (9<sup>th</sup> Cir. 2009) (“Where Congress ‘includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”), (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983); *Paul Revere Ins. Group v. United States*, 500 F.3d 957, 962 (9<sup>th</sup> Cir. 2007) (“[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.”) (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994))). Accordingly, Guardians’ claim that section 166(a) imposes a mandatory duty for EPA to promulgate PSD rules within two years after a NAAQS for a particular pollutant has been *revised* must be rejected.

The original NAAQS covering photochemical oxidants were promulgated before 1977. EPA began using the ozone indicator for photochemical oxidants in 1979. The ozone NAAQS have been subsequently revised, most recently in 2008. In claiming that the 2008 ozone NAAQS revision

1 triggered a mandatory duty to promulgate PSD rules, Guardians is asking the Court to construe  
 2 section 166(a) as if it created a mandatory duty to write PSD regulations under section 166(a) any  
 3 time a NAAQS is promulgated *or revised* after August 7, 1977. This construction is unfounded.

4 Guardians' complaint relies on the second sentence of section 166(a), which addresses EPA's  
 5 obligations with respect to *pollutants* for which NAAQS are promulgated after August 7, 1977, but  
 6 not necessarily every NAAQS rulemaking after that date. This sentence does not apply to the EPA's  
 7 2008 ozone NAAQS revision because a NAAQS covering this pollutant (ozone) was first  
 8 promulgated many years earlier. More importantly, the second sentence of section 166(a), like the  
 9 first, does not impose any mandatory duty triggered by the revision of a NAAQS. In 2008, EPA  
 10 made explicitly clear that the Agency was revising the existing NAAQS for ozone—not establishing  
 11 a NAAQS for an additional pollutant. 73 Fed. Reg. at 16,436 ("Summary of Revisions to the O3  
 12 NAAQS"). Therefore, the Agency's obligation under the second sentence of section 166(a) to  
 13 promulgate PSD rules after promulgation of a NAAQS for a pollutant within two years was not  
 14 triggered. Because there is no duty mandated by section 166(a) with respect to the ozone NAAQS  
 15 revision that EPA has failed to perform, the first claim in Guardians' complaint must be dismissed as  
 16 outside the scope of jurisdiction authorized by the CAA's citizen suit provision.  
 17  
 18  
 19

## 20 CONCLUSION

21 Guardians' first claim, that EPA had a mandatory duty, which it failed to perform, to  
 22 promulgate PSD rules within two years after revising the ozone NAAQS should be dismissed for  
 23 lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

24 Respectfully submitted,

25 IGNACIA S. MORENO  
 26 Assistant Attorney General  
 Environment and Natural Resources Division

1                    /s/ Eileen T. McDonough  
2                    EILEEN T. MCDONOUGH  
3                    Trial Attorney  
4                    United States Department of Justice  
5                    Environmental Defense Section  
6                    P.O. Box 7611  
7                    Washington, D.C. 20044  
8                    Telephone: (202)514-3126  
9                    Fax: (202) 514-8865  
10                   Email: eileen.mcdonough@usdoj.gov

11                   *Attorneys for Defendant*

12 Of Counsel:

13 Geoffrey Wilcox  
14 Melina Williams  
15 EPA Office of General Counsel  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28